No. 74987-6

CHAMBERS, J. (concurring in part/dissenting in part) — I concur with the analysis of the majority that this initiative was beyond the scope of the initiative power of the residents of Sequim. However, I agree with the trial court, the Court of Appeals, and the dissent that this action is not justiciable and should be dismissed. I write separately because I am not satisfied with the resolution of the justiciability issue articulated either by the majority or by the dissent.

Generally, I am of the view that courts should not interfere with elections. But I accept that there is a well established exception to this principle. Courts have an obligation to prevent elections on improper subjects. It was the obligation of the court below to prevent this initiative, the Ratepayer's Responsibility Act, from going to the voters because it was an attempt to amend state law. *See generally State ex rel. Haas v. Pomeroy,* 50 Wn.2d 23, 27-28, 308 P.2d 684 (1957) (distinguished by *Earle M. Jorgensen Co. v. Seattle,* 99 Wn.2d 861,866, 665 P.2d 1328 (1983)); *Benton v. Seattle Electric Co.,* 50 Wash. 156, 96 P. 1033 (1908). By far, the best practice is to expedite review of a challenge to a voter's initiative so that it can be finally decided before the election.

It is important to the principles of justiciability, as the majority points

out, to have real parties with real adversarial and opposing interests to genuinely represent the interests of both sides. Without doubt, the sponsors who have campaigned for local initiative and referendum measures have an abiding interest in defending these measures. Those sponsors likely have standing. However, as the Court of Appeals and the dissent appropriately point out, permitting a city to choose its own representative to defend an initiative petition even if it is a sponser, may allow "[t]he plaintiff [to] set up a 'straw man' defendant whom it can easily knock over." *City of Sequim v. Malkasian*, 119 Wn. App. 654, 661, 79 P.3d 24 (2003). In my view, when an individual, singled out by a government to defend an initiative establishes that he or she is not the appropriate party to defend it and moves to dismiss the action on those grounds, that should be the end of the case. Whether the action is preelection or postelection does not change the justiciability equation in my view.

The dissent's suggestion that the city clerk is the appropriate party to vigorously defend an initiative opposed by the city does not present a satisfactory alternative to satisfy the justiciability requirement. Here, the preelection/postelection distinction may affect the equation. Before the initiative is passed, it does not have the authority of an ordinance. Thus, the city clerk does not have a duty to enforce or defend it. Until the legislature creates an appropriate mechanism, the courts, in furtherance of equity and the proper functioning of the democratic process, have a duty to

ensure that those willing and able to vigorously defend the initiative are the parties defending it before the court.

Should Paul Malkasian be awarded attorney fees? I would, if I could, but I can't. Here again, I agree in part with both the majority and the dissent. The majority is correct that generally the common fund/common benefit rule, an equitable theory, allows for an award of attorney fees when a litigant preserves or creates a common fund for the benefit of others as well as themselves. The majority is also correct that Malkasian has not created such a common fund. *Bowles v. Dep't of Ret. Sys.,* 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993). The dissent is correct in pointing out that this court has awarded reasonable attorney fees under similar circumstances based upon this common benefit theory. *Seattle Trust & Savings Bank v. McCarthy*, 94 Wn.2d 605, 612-13, 617 P.2d 1023 (1980) (awarding attorney fees for protecting the rights of other minority shareholders). However, I would not extend application of the common fund/common benefit rule into the arena of public debate, initiatives, referendums, and elections. The legislative branch has extensively and appropriately legislated in this field. Perhaps in the future, the legislature will provide recourse for individuals dragooned against their will to defend initiative petitions. With those reservations, I concur with the dissent that this case should have been dismissed as nonjusticiable.

AUTHOR:

Justice Tom Chambers

WE CONCUR: